86-284

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARGUERITE COOPER, ET AL.,

CROSS-PETITIONERS

V.

GEORGE P. SHULTZ, SECRETARY OF STATE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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#124

QUESTION PRESENTED

Whether attorneys' actual hourly billing rates must automatically be used to compute an attorneys' fees lodestar, although those billing rates are substantially below the range of rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 896, n. 11 (1984).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the cross-petitioners in the court of appeals were Alison Palmer, Mary A. Ryan, A. Ellen Shippy, Mary Lee Garrison, Mary C. Finrow, Mary Hartman, JulieAnn McGrath, and Laurel Cooper, individually and on behalf of a class of female Foreign Service Officers and female applicants who had been rejected for Foreign Service Officer positions.

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Marguerite Cooper, et al, on behalf of a class of women who unsuccessfully applied to become Foreign Service Officers between 1976 and 1983, cross-petitions for a writ of certiorari to

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1/ The case was originally captioned "Marguerite Cooper King, et al. v. United States, et al." in the district court. Subsequently, Ms. King notified the district court that she had legally changed her name to Marguerite Cooper and the caption was modified.

review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment and memorandum of the court of appeals are unpublished. The decision of the district court on reconsideration is reported at 598 F. Supp. 382 (1984). This superseded the district court's prior decision, which is reported at 594 F. Supp. 433 (1984). For the convenience of the Court, cross-petitioners refer to the government's Appendix to Petition for a Writ of Certiorari ("Pet. App.") for both the court of appeals' decision (Pet. App. 1a-2a) and those of the district court (Pet. App. 3a-17a and 26a-45a).

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1986. The Petition for a Writ of Certiorari in connection with which this Cross-Petition is filed was received by cross-petitioners on July 23, 1986. This Cross-Petition is filed in reliance on Rule 19.5 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Cross-petitioners, on behalf of a class of female Foreign Service Officers ("FSOs") and female applicants to become FSOs, brought this action in 1976 alleging that the Department of State discriminated against women both in their opportunities for hire as FSOs and in their employment opportunities after hire, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331. All claims relating to the initial hiring of female FSOs at the entry level were resolved on October 12, 1983, when the District Court for the District of Columbia approved a consent decree which provided, inter alia, that petitioner would appoint

75 class members as FSOs during the calendar years 1984 through 1987. The district court found that the settlement "eliminat[ed] seven previous years of hiring disparities and carr[ied] a conservatively estimated value of $8.6 million." Pet. App. 12a. The Consent Decree further provided that its entry by the court constituted a final action on the entry-level hiring portion of the case and entitled cross-petitioners to move the court for attorneys' fees and costs.

In December 1983, cross-petitioners applied for $416,736.03 in fees and expenses.[2/] This request included hourly

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2/ Cross-petitioners supplemented this request in July 1984 and again in December 1984, seeking an additional $52,966.81 in fees and expenses, thereby bringing respondents' total request to $469,702.84.

rates ranging from $75 to $150 per hour, depending on the level of experience of the individual attorney, and a 24% contingency adjustment. Cross-petitioners did not at that time seek an upward adjustment for the quality of representation on the ground that "[t]he quality of an attorney's work in general is a component of the reasonable hourly rate." Pl. App. for an Award of Attorneys' Fees and Expenses, p. 29 (December 12, 1983). Cross-respondent did not oppose either cross-petitioners' entitlement to an award of attorneys' fees and expenses as a prevailing party or the reasonableness of the hours spent by cross-petitioners' counsel. It challenged only the hourly rates at which compensation was sought, the contingency multiplier, and certain expenses.

On September 17, 1984, the district court granted cross-petitioners' request for an award of attorneys' fees and expenses in the amount of $439,541.48, departing only from cross-petitioners' application in allowing a 20%, rather than a 24%, contingency multiplier. Rejecting arguments that counsel for cross-petitioners' actual historic billing rates of $35 in 1976 to $65 for associates and $80 for partners in 1983 (based upon a flat fee irrespective of the individual attorney's skill or experience) were controlling, the district court instead found that cross-petitioners' proposed rate schedule ranging from $75 to $150 an hour (depending upon the individual attorney's years of experience) was consistent with then current prevailing community rates and accurately reflected the complexity

of the litigation and the "skill, experience, and reputation" of counsel. Pet. App. 29a-34a.

Eleven days after the district court's September 17, 1984, opinion, the Court of Appeals for the District of Columbia Circuit decided Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (1984), certiorari denied, 105 S.Ct. 3488 (1985), which held that an attorney's actual billing rate is presumptively the market rate for his services. Cross-respondent moved for a stay of the district court's order awarding fees and moved for reconsideration in light of Laffey.

Cross-petitioners argued that Laffey did not require the use of counsel's actual billing rates in this case, but that, if the court found to the contrary,

it should adjust the lodestar upward to reflect the quality of counsel's representation. The district court found that it was required by Laffey to use counsel's actual current rates in order to calculate the lodestar, but it then adjusted the lodestar upward by 54.75% in order to reflect its finding that counsel's "services were equal in quality to those of attorneys charging that [higher] rate" and "far superior to what could be reasonably expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners." Pet. App. 12a.

The district court's total award after reconsideration, therefore, did not differ significantly from its original award. The district court used the law firm's current actual billing rates to arrive at the lodestar, then separately

multiplied the merits lodestar by the 54.75% quality multiplier and the 20% contingency adjustment. No enhancements were made of the lodestar for the time spent litigating the attorneys' fee application itself.

Cross-respondents appealed, and cross-petitioners cross-appealed, the district court's modified award. In a brief unpublished opinion, the court of appeals (Judges Ginsburg, Scalia and Buckley) suggested that its own interpretation of Laffey, supra, might have led it to conclude that the use of counsel's actual billing rates was not appropriate in this case as "the firm's own rate may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community." Pet. App. 2a. However, in light of the

"reasonable result achieved" and the "large respect we owe to district court assessments in these matters," the court declined to disturb the award. Ibid.

REASONS FOR GRANTING THE CROSS-PETITION

Cross-petitioners contend, first, that this Court should deny the Petition for a Writ of Certiorari in connection with which this Cross-Petition is filed. See Brief in Opposition to Petition for a Writ of Certiorari. If, however, this Court grants a writ of certiorari, cross-petitioners urge the Court also to grant a writ of certiorari with regard to whether attorneys' actual billing rates, rather than market rates, should automatically be used to calculate the attorneys' fees lodestar.

1. The decisions of both the district court and the court of appeals in

this matter inextricably intertwine the issue of the appropriate hourly rate to be used in calculating the lodestar with the issue of whether a quality enhancement is warranted. The reason for this linkage is obvious from a practical point of view. Competent counsel in large commercial law firms are entitled to compensation based on their own billing rates. See Blum v. Stenson, supra, 465 U.S. at 895-896, n. 11 (1984); Laffey v. Northwest Airlines, Inc., supra, 746 F.2d at 18. Similarly competent attorneys working for non-profit organizations are also entitled to compensation based on the billing rates of large commercial law firms. Blum v. Stenson, supra, 465 U.S. at 890-891, n. 4 and 895. However, according to the district court, Laffey, supra, automatically limits cross-petitioners' counsel, who charge well below

commercial market rates in order to serve clients who cannot afford commercial rates, to the rates they actually charge for purposes of lodestar computation. Pet. App. 11a.

Such a result is clearly inequitable. This is shown particularly by the $80 per hour rate which the government contends must be used to determine the lodestar for work performed in 1983 by plaintiffs' lead counsel, Bruce J. Terris. Mr. Terris has 29 years of experience. After graduating magna cum laude from Harvard and serving as an officer of the Harvard Law Review, Mr. Terris joined the Department of Justice where he spent seven years in the Solicitor General's Office. Mr. Terris formed his own law firm in Washington, D.C., in 1970. Pl. App. for an Award of

Attorneys' Fees, Attachment C. The district court found Mr. Terris' work, along with that of the other attorneys in the firm, to be "superior throughout." In comparison, in Blum v. Stenson, this Court approved a rate of $105 an hour for an attorney with 1 1/2 years of experience as a practicing attorney, based on a fee request filed in 1980. 465 U.S. at 890-891, n. 4. In City of Riverside v. Rivera, 54 U.S.L.W. 4845, 4846, n. 2 and 4852 (June 27, 1986), this Court upheld a rate of $125 an hour for attorneys with two years of experience or less. These comparisons demonstrate that Mr. Terris' $80 per hour billing rate is far below the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, supra, 465 U.S. at 896, n. 11.

The district court solved this obvious inequity by awarding cross-petitioners' counsel an upward adjustment for quality of representation which equalled the difference between their own rates and rates charged by other counsel of equal experience and competence. Pet. App. 12a. Since the district court found that "plaintiffs' services were far superior to what could reasonably be expected" of attorneys charging such low rates, the district court concluded that this was the rare case where quality of representation was not reflected in the hourly rate. Pet. App. 11a-12a.

The court of appeals likewise considered the issues of the hourly rates and the quality adjustment to be linked when it affirmed the district court's judgment. In its brief Memorandum

Opinion, the court of appeals explicitly questioned both the enhancements made by the district court and the use of an hourly rate that "may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community." Pet. App. 2a. The court noted that it might have been more appropriate to recognize the difference between counsels' billing rates and the market rates by using more adequate hourly rates instead of a "bonus." Ibid. However, in light of the fact that these possible errors "offset" each other and of "the reasonable result achieved" by the use of the low hourly rate together with the enhancements (ibid.), the court of appeals affirmed the district court's award.

Both courts below have therefore considered the issues of the appropriate

use of enhancements and that of the appropriate hourly rate as alternative methods of addressing a single factual problem. Consideration by this Court of the enhancement issue absent consideration of the appropriate rates would leave the Court without the ability to address the problem as a whole and would risk producing a seriously inequitable result.

2. If the Petition for a Writ of Certiorari and this Cross-Petition are granted, cross-petitioners submit that this Court should provide plenary review of the issues, rather than summarily vacating the judgment, as proposed by petitioner. Pet. 9. The district court interpreted Laffey v. Northwest Airlines, Inc., supra, as creating an irrebutable presumption that a firm's customary hourly rates are the appropriate market

rates to be used in calculating the lodestar.[3/] If Laffey is so interpreted, we submit that it is inconsistent with prior decisions of this Court.

In Blum v. Stenson, supra, 465 U.S. at 895, this Court held that reasonable fees are to be calculated "according to the prevailing market rates in the relevant community." The Court required parties requesting fees to "produce satisfactory evidence * * * that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Id. at 896, n. 11. Thus,

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3/ As we noted in our Brief in Opposition to Petition for a Writ of Certiorari, pp. 15-16, the decision which the government seeks to have this Court review is in reality that of the district court in light of the brief opinion of the court of appeals.

Blum establishes the rule that the lodestar for all attorneys is to be based on prevailing market rates.

More recently, in City of Riverside v. Rivera, supra, this Court affirmed rates of $125 an hour, determining that this was the "rate typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District [of California] at the time those services were performed." Id. at 4846, n. 2 (citing an unpublished district court opinion). No mention was even made of the attorneys' actual billing rates. The majority opinion stated (id. at 4849):

> * * * Congress made clear that it 'intended that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litiga-

> tion, such as antitrust cases [emphasis added] and not be reduced because the rights involved may be nonpecuniary in nature.' [emphasis in original; bracketed material in original]

The dissenting opinion by Mr. Justice Rehnquist did not disagree with the majority's interpretation of the legislative history of 42 U.S.C. 1988. Id. at 4854. On the contrary, he stated that a determination of the reasonableness of an attorneys' fee request (id. at 4853):

> * * * must be made in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a 'reasonable' attorney's fee under [section] 1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys. [emphasis added]

In short, any rule that automatically uses an attorney's own rates to calculate the lodestar, regardless of whether those rates reflect

the prevailing community rate for similar work, is inconsistent with this Court's rulings in both Blum and City of Riverside.

3. If, contrary to cross-petitioners' position, the Court grants the government's Petition for a Writ of Certiorari, and determines to remand the matter to the lower courts as requested by petitioner (Pet. 9), cross-petitioners submit that the remand should expressly direct reconsideration of the issue of the appropriate hourly rate as well as the issues raised by the government. As described above, consideration of this issue is a necessary part of any fair determination of the issue of quality enhancements. This Court should therefore ensure that, in the event of a remand, these issues will continue to be considered together.

CONCLUSION

If the government's Petition for a Writ of Certiorari is granted, cross-petitioners request that this Cross-Petition also be granted and the issues raised be given plenary review by this Court.

Respectfully submitted,

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